85-588

No.

# In the Supreme Court of the United States

**OCTOBER TERM, 1985**

THE UNIVERSITY OF TENNESSEE, et al., *Petitioners,*

vs.

ROBERT B. ELLIOTT, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTION PRESENTED

Whether traditional principles of preclusion apply in an action under Title VII, section 1983, and other civil rights statutes to preclude issues fully and fairly litigated before a state administrative agency acting in a judicial capacity.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 9, 1985.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported in 766 F.2d 982 (6th Cir. 1985), and a copy of the slip opinion appears in the Appendix hereto. The memorandum

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1. Petitioners are the defendants below—The University of Tennessee, The University of Tennessee Institute of Agriculture, The University of Tennessee Agricultural Extension Service, University officials (M. Lloyd Downen, Willis W. Armistead, Edward J. Boling, Haywood W. Luck, and Curtis Shearon), members of the Madison County Agricultural Extension Service Committee (Billy Donnell, Arthur Johnson, Jr., Mrs. Neil Smith, Jimmy Hopper, and Mrs. Robert Cathey), Murray Truck Lines, Inc., Tom Korwin, and Tommy Coley. Petitioner Coley is appearing *pro se*.

decision of the United States District Court for the Western District of Tennessee and the final agency order in the contested case hearing under the Tennessee Uniform Administrative Procedures Act also appear in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 9, 1985, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1964).

## STATEMENT OF THE CASE

The University of Tennessee is an agency of the State of Tennessee, and respondent is a black employee of the University's Agricultural Extension Service. The University proposed to terminate respondent's employment for disciplinary reasons. Respondent elected to contest the proposed termination in a hearing under the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301 through -323 (Supp. 1984). Before the hearing was held, however, respondent filed this action under Title VII and 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, seeking an injunction against any action with respect to his employment, one million dollars in damages, and certification of a class action. The district court did not certify a class. After entry and dissolution of a temporary restraining order, the district court ruled that respondent had failed to meet the prerequisites for preliminary injunctive relief and removed any restraint regarding employment action against respondent. Respondent elected



to proceed with the administrative hearing and did not seek further action in federal court.

In compliance with the Administrative Procedures Act, respondent's hearing was conducted with complete trial rights including discovery, subpoenas, representation by counsel, examination and cross-examination of witnesses, and filing of pleadings, briefs, and proposed findings of fact. The administrative record consists of 55 volumes with over 5,000 pages of testimony from over 100 witnesses and 159 exhibits. Respondent insisted that evidence of alleged racial discrimination be admitted in the administrative hearing. The University objected that this evidence should be introduced instead in respondent's Title VII action. Despite this objection, the Administrative Law Judge admitted voluminous evidence of alleged racial discrimination against respondent. Nonetheless, the Administrative Law Judge found that the proposed termination was not racially motivated. Finding further, however, that the University's proof was insufficient to warrant respondent's termination, the Administrative Law Judge ordered that respondent be transferred to another county under new supervisors. The findings of the Administrative Law Judge were affirmed on appeal to the Agency Head.

Tenn. Code. Ann. § 4-5-322 (Supp. 1984) provides for judicial review of a final agency order upon the filing of a petition within sixty days of the order. Respondent failed to file a petition for judicial review within sixty days. Instead, after his transfer had been accomplished and eighty-four days after the final agency order, respondent filed a motion in the district court for a temporary restraining order, preliminary injunction, and stay of the final agency order. The University defendants opposed the motion and amended their earlier motion for summary judgment. In granting summary judgment for the de-

fendants, the district court held that it lacked subject matter jurisdiction under Tenn. Code Ann. § 4-5-322 (Supp. 1984) to review the merits of the final agency order and that it was otherwise precluded by res judicata principles from reviewing the issues fully litigated in the administrative hearing. The Sixth Circuit reversed, holding that a final state administrative judgment is never entitled to preclusive effect in a subsequent federal court action under either Title VII or section 1983.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING THE PRECLUSIVE EFFECT OF ADMINISTRATIVE ADJUDICATIONS AND THE APPLICATION OF TRADITIONAL PRINCIPLES OF PRECLUSION IN SUBSEQUENT SECTION 1983 ACTIONS.

In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), this Court held that traditional principles of res judicata are applicable to administrative proceedings "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. . . ." *Id.* at 422. Applying this principle to the facts in *Utah*, this Court concluded as follows:

> [T]he Board was acting in a judicial capacity . . . the factual disputes were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.



*Id.* By holding that traditional principles of res judicata are applicable to administrative proceedings, this Court recognized the modern model of administrative procedure which often closely approximates judicial procedure and thus merits the same finality.

In the decision below, the Sixth Circuit acknowledged the holding in *Utah* but refused to apply it to the question of whether a final state administrative judgment precludes relitigation of issues in a federal civil rights action. The court treated the holding as limited to the res judicata effect of federal administrative decisions in subsequent federal court proceedings. Appendix at A14-15, A18. There is nothing in this Court's opinion in *Utah*, however, to suggest that the holding is so limited. This Court expressly invoked general principles of res judicata and described their application to "an administrative agency acting in a judicial capacity" without use of the delimiting term "federal agency." *Id.* at 421-422. Moreover, in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court cited the *Utah* holding approvingly in considering the adequacy of state proceedings to be given preclusive effect in a subsequent Title VII action:

> Certainly, the administrative nature of the fact-finding process is not dispositive. In *United States v. Utah Construction & Mining Co.* [citation omitted], we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity" [citation omitted].

*Id.* at 484-485 n.26. The Sixth Circuit clearly erred, therefore, in failing to follow this Court's opinion in *Utah* and to apply traditional principles of res judicata to the final administrative judgment in this case.

Furthermore, the failure of the Sixth Circuit to follow the *Utah* holding leads to a conflict between the decision below and the opinion of this Court in *Allen v. McCurry*, 449 U.S. 90 (1980). In *Allen*, this Court held that nothing in the language or legislative history of section 1983 suggests a congressional intention to contravene traditional doctrines of preclusion. *Id.* at 97-98. In so holding, this Court rejected the suggestion "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Id.* at 103. This Court reaffirmed *Allen* in *Migra v. Warren City School District*, ..... U.S. ....., 104 S. Ct. 892 (1984), extending application of res judicata principles in section 1983 actions from the issue preclusion rule of *Allen* to preclusion of the claim itself. The Sixth Circuit's refusal to give preclusive effect to the final administrative judgment in this case rests, however, on the assumption that "Congress provided a civil rights claimant with a federal remedy in a federal court, with federal process, federal factfinding, and a life-tenured judge." Appendix at A20. This assumption cannot be reconciled with this Court's holding in *Allen* and *Migra* that section 1983 creates no exception to traditional rules of preclusion, which are applicable, according to the *Utah* holding, to administrative adjudications as well as judicial proceedings.[2]

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2. The decision below also conflicts in principle with the holding in *Allen* and *Migra* that the preclusive effect of state court proceedings in subsequent section 1983 actions is governed

(Continued on following page)



## 2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE PRECLUSIVE EFFECT OF STATE ADMINISTRATIVE ADJUDICATIONS IN SUBSEQUENT FEDERAL CIVIL RIGHTS ACTIONS.

In refusing to give preclusive effect to the final administrative judgment of the state agency in this case, the Sixth Circuit conceded that its decision conflicts with that of other circuits. Appendix at A24-25. Although the court conceded conflict only with respect to the application of preclusion principles in civil rights actions under 42 U.S.C. § 1983, the decision also conflicts with decisions of the Third and Seventh Circuits in Title VII actions. *See Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842 (7th Cir. 1985) (slip op. in Appendix at A185); *O'Hara v. Board of Education*, 590 F. Supp. 696 (D.N.J. 1984), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985).

In refusing to apply principles of res judicata to preclude respondent's Title VII action, the Sixth Circuit held that the issue was controlled by the following general principle stated by this Court in footnote 7 of *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 470 (1982): "[U]nreviewed administrative determinations by state agencies . . . should not preclude . . . [*de novo*] review

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Footnote continued—

by the state's own law of res judicata. The Sixth Circuit failed even to consider whether the state administrative adjudication in this case would have been afforded preclusive effect in the courts of the State of Tennessee. If the Sixth Circuit had looked to the law of res judicata in Tennessee, it would have found that an administrative adjudication by a state agency acting in a judicial capacity is entitled to preclusive effect in Tennessee courts. *See Polsky v. Atkins*, 197 Tenn. 201, 270 S.W.2d 497 (1954); *Fourakre v. Perry*, 667 S.W.2d 483 (Tenn. App. 1983); *Purcell Enterprises, Inc. v. State*, 631 S.W.2d 401 (Tenn. App. 1981).

[in federal court] even if such a decision were to be afforded preclusive effect in a State's own courts." The Sixth Circuit rejected petitioner's argument that this general principle, considered in the light of this Court's citation of the *Utah* holding with approval in footnote 26, must be construed to apply only with respect to administrative decisions rendered by agencies possessing investigatory rather than adjudicatory authority. Appendix at A12-13. With respect to respondent's action under 42 U.S.C. § 1983 and the other Reconstruction Civil Rights Statutes, the Sixth Circuit first concluded that the *Utah* holding does not apply in the state-to-federal context and then refused to create, as it put it, a rule of administrative preclusion in section 1983 actions. Appendix at A20.

Less than two weeks after the Sixth Circuit's decision in this case, the Seventh Circuit decided *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842 (7th Cir. 1985) (slip op. in Appendix at A185). The decision below directly conflicts with the Seventh Circuit's opinion on the question presented by this petition. Like the present case, *Buckhalter* involved both a Title VII action and an action under 42 U.S.C. § 1981. Beginning with this Court's acknowledgement of "administrative res judicata" in footnote 26 of the *Kremer* opinion, the Seventh Circuit considered the *Utah* criteria to determine whether principles of res judicata should be applied to plaintiff's Title VII action. Finding that the state administrative agency had acted in a judicial capacity and that both parties had had a full and fair opportunity to litigate their case, the Seventh Circuit concluded that principles of res judicata should be applied to determine whether the plaintiff's Title VII action was precluded by the prior administrative proceeding. Appendix at A200-206. Unlike the Sixth Circuit in the decision below, the Seventh Circuit expressly rejected



a broad interpretation of footnote 7 of the *Kremer* opinion, concluding that it applied only to judicially unreviewed administrative decisions by agencies exercising investigatory rather than adjudicatory authority. The court noted that a narrow interpretation of footnote 7 is supported by this Court's approving citation of the *Utah* holding in footnote 26 of the same opinion. Appendix at A208-210. Finally, the Seventh Circuit held that the principles of "administrative res judicata" are applicable to civil rights actions brought under section 1981 as well as Title VII and thus dismissed the plaintiff's claims under both statutes. Appendix at A212. The decision below is thus squarely and irreconcilably in conflict with the Seventh Circuit's decision in *Buckhalter*.

With respect to respondent's Title VII action, the decision below is also squarely and irreconcilably in conflict with the Third Circuit's decision in *O'Hara v. Board of Education*, 590 F. Supp. 696 (D.N.J. 1984), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985). In determining whether a federal court may give collateral estoppel effect to a state administrative agency decision, the district court in *O'Hara* looked not only to the *Utah* criteria of whether the agency was acting in a judicial capacity and whether the parties had an adequate opportunity to litigate the issues but also to whether a state court would give preclusive effect to the administrative decision. *Id.* at 701. The *O'Hara* court thus relied in part on the full-faith-and-credit requirement of 28 U.S.C. § 1738 (1964). In the decision below, however, the Sixth Circuit summarily rejected any application of traditional principles of full-faith-and-credit to adjudicatory proceedings before administrative agencies. Appendix at A11, A16. Therefore, although the Third Circuit affirmed the district court decision in *O'Hara* without an opinion, its decision must be considered as directly in conflict with the decision below.

With respect to respondent's action under 42 U.S.C. § 1983 and the other Reconstruction statutes, the decision below directly conflicts with decisions of the Second and Eighth Circuits. In *Zanghi v. Incorporated Village of Old Brookville,* 752 F.2d 42 (2d Cir. 1985), the Second Circuit held that a prior finding of probable cause to arrest by an administrative law judge precluded the plaintiff's section 1983 action for false arrest, false imprisonment, and malicious prosecution. The Second Circuit based its holding on this Court's opinion in *Utah.* Similarly, in *Steffan v. Housewright,* 665 F.2d 245 (8th Cir. 1981), the Eighth Circuit relied on the *Utah* holding to preclude the plaintiff's due process claims under section 1983. The Sixth Circuit's refusal to apply the *Utah* holding in a section 1983 action thus presents a clear conflict with decisions by the Second and Eighth Circuits.

On the other hand, the Second and Eighth Circuits have failed to give preclusive effect to state administrative proceedings in subsequent Title VII actions, relying on footnote 7 of this Court's opinion in *Kremer. See Heath v. John Morrell & Co.,* 768 F.2d 245 (8th Cir. 1985); *Bottini v. Sadore Management Corp.,* 764 F.2d 116 (2d Cir. 1985). Similarly, the Fourth Circuit has held in a Title VII action that "unreviewed administrative determinations by state agencies do not preclude a trial *de novo* in federal court." *Ross v. Communications Satellite Corp.,* 759 F.2d 355, 361 n.6 (4th Cir. 1985). In an earlier decision, *Moore v. Bonner,* 695 F.2d 799 (4th Cir. 1982), the Fourth Circuit had failed to give preclusive effect to a state administrative judgment in a subsequent section 1983 action, holding that preclusion is not required by the full-faith-and-credit requirement of 28 U.S.C. § 1738 (1964) and failing to address this Court's decision in *Utah.*

These decisions from the Second, Third, Fourth, Seventh and Eighth Circuits, together with the Sixth Circuit's



decision below, demonstrate that a serious and continuing conflict exists among the courts of appeals on the question presented by this petition. Moreover, the conflict has become particularly intense since this Court's 1982 decision in *Kremer,* with much of the debate centering on inferences to be drawn from footnotes 7 and 26 of that opinion. This important question of federal law should be decided by this Court. The existing conflict will not abate in the absence of a decision by this Court.

### 3. THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS CONCERNS A MATTER OF NATIONAL IMPORTANCE.

The Sixth Circuit's decision in this case seriously undermines the finality of state administrative proceedings and encourages repetitious litigation. It thus contravenes both the public interest in judicial economy and the private interest in repose underlying the doctrine of res judicata. *See* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4403 (1981). It produces the possibility of conflicting results on the same issue and burdens the federal courts with the necessity of hearing issues which have already been litigated fully and fairly between the parties.

Moreover, many states have enacted administrative procedures acts which are similar to the one in this case. *See* 1 K. Davis, *Administrative Law Treatise* § 1:10 (1983). The adjudicatory nature of contested case hearings under these acts may be virtually identical to that of federal and state courts, as was true in this case. Therefore, the significance of the Sixth Circuit's refusal to enforce repose when respondent elected to pursue his claims under the formal adjudicative procedure established by state law—and then failed to pursue judicial review provided by

state law—goes far beyond the particular facts and parties in this case. It calls into serious question the validity of the modern model of administrative procedure as a mechanism for resolution of disputes, especially disputes between employers and employees.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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